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Case Comments

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CONSTITUTIONAL LAW—SEARCH AND SEIZURE.—Owner of the premises asked the sheriff to search a vacant tenant house for whiskey. The defendant was taken into custody by the sheriff for operating a still therein. The defendant claims the evidence was incompetent because it was obtained by an illegal search, the sheriff having no warrant. Held, evidence competent. The constitutional provision against unreasonable searches applies only to the rightful owners of property or persons rightfully in possession. *Carter* v. *Commonwealth*, 234 Ky. 695, 28 S. W. (2d) 976.

Section 10 of the Kentucky constitution reads as follows: "The people shall be secure in their persons, houses, papers and possessions, from unreasonable search and seizures; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation." The fourth amendment to the constitution of the United States is in substance the same.

The problem here is, who is entitled to raise the question of unreasonable search and seizure with respect to property, In the wording of the principal case, it interprets the constitution to mean that protection extends to either the owner or the person rightfully in possession. No stranger who neither owns nor possesses the property can find protection. *Lakes* v. *Commonwealth*, 200 Ky. 266, 254 S. W. 908. Nor can a bare licensee by acquiescence complain of a search without a warrant. *Duke* v. *Commonwealth*, 201 Ky. 365, 256 S. W. 725. The same general rule is found in *Anderson* v. *Commonwealth*, 204 Ky. 486, 264 S. W. 1087. In view of the foregoing cases, it is all the more reasonable that a trespasser should not find protection behind the screen of constitutional rights.

Other states have interpreted their constitutional provisions similarly. *Lee* v. *City of Oxford*, 134 Miss. 647, 99 So. 507; *State* v. *Fenley*, 309 Mo. 520, 275 S. W. 36; *Jenkins* v. *State*, 198 Tex. Cr. R. 184, 299 S. W. 642.

The case of *Buchanan* v. *Commonwealth*, 210 Ky. 364, 275 S. W. 878, is confusing. There the defendant had leased the premises searched. The sheriff had a warrant to search at the time but he lost it. The court said the question of whether or not the warrant was of sufficient description to include the defendant's leased premises need not be determined, since "the constitutional protection against unreasonable searches and seizures is directed to the protecting of the defendant's premises and possessions from such searches, and he cannot object to a wrongful search of another's premises or possessions." Under the rule of the principal case this case is wrong, since the defendant was the owner of the premises even though he did not have the

possession. The rule reads, either ownership or possession. The case of *Anderson* v. *Commonwealth, supra* cited in the Buchanan case does not stand for the proposition laid down there.

The District Court in *U. S.* v. *Wexler*, 4 Fed. (2d) 391, held that if the house or premises of a co-defendant are unreasonably searched without a proper warrant, he alone whose house has been unreasonably or illegally searched will be heard to complain. The evidence secured thereby is admissible against all other defendants. In *Coon* v. *U. S.*, 36 Fed. (2d) 164, the court said, "The legality of the search of premises can be raised only by the owner, lessee or lawful occupant of the premises searched; that is, by the person whose rights have been invaded." See also *Lusco* v. *U. S.*, 287 Fed. 69; *U. S.* v. *Kaplan*, 286 Fed. 963. The Federal rule is consonant with the principal case, but is flatly opposed to the Buchanan holdings. And the latter case is even more surprising in view of the broad interpretation the Kentucky courts have put upon this section of the constitution. *Youman* v. *Commonwealth*, 189 Ky. 152, 224 S. W. 860; *Morse* v. *Commonwealth*, 204 Ky. 672, 265 S. W. 37. The liberal interpretation is no doubt the better one. It is to be remembered that the purpose of this constitutional provision is to protect the indefeasible right of personal liberty, personal security, and private property. J. C. B.

CRIMINAL LAW—TRIAL—SETTING ASIDE VERDICT AS AGAINST THE WEIGHT OF THE EVIDENCE.—Bourne was convicted of manslaughter and sentenced to fifteen years in prison for the killing of Hugh Wayne. From this conviction, he appealed on the ground that the verdict is flagrantly against the weight of the evidence. The preponderance of the evidence was to the effect that accused shot deceased in self-defense, but the appellate court held the verdict good and stated the rule that if there is any evidence upon which the jury could base its conclusion of guilt, the verdict will not be set aside as contrary to the weight of the evidence unless there was an error of law prejudicial to the substantial rights of the defendant. *Bourne* v. *Commonwealth*, 234 Ky. 842, 29 S. W. 2nd 561.

Defendant's testimony was to the effect that deceased, during a friendly conversation with defendant, became very angry over a fence dividing their places; that deceased jumped up and caught him by the arm with one hand and, cursing him violently, reached for his hip with the other hand. Defendant knew that deceased had a bad reputation for peace and good order, and he had heard that deceased carried a gun all the time and that he had killed a man. This statement was corroborated more or less fully by five other witnesses, so the preponderance of the evidence was against the verdict, and favored a plea of self-defense.

However, the court said the verdict should not be disturbed under the rule laid down. Defendant killed deceased. Deceased was not armed, and he had one shot in the back, with all the shots ranging downward. In addition to these facts, the record before the appellate

court was not complete, because of the many demonstrations and illustrations made in the trial but not contained in the record. So, it seems that the court was justified in holding that there was evidence upon which the jury could base its verdict, and, finding no error of law, that the veridct should not be disturbed.

A few cases will show that the rule applied has long been the law in Kentucky, which follows the general rule. It is elementary and granted that questions of fact are to be decided by the jury, and where the evidence reasonably supports the verdict, it will stand, and the judgment will be affirmed. *Holland* v. *Commonwealth*, 200 Ky. 44, 261 S. W. 851. Another case says that where, in a criminal case, there is any evidence to support a finding or verdict, the judgment will not be reversed on appeal. *Elliott* v. *Commonwealth*, 206 Ky. 222, 266 S. W. 162. Another case held that where there are facts sufficient to take the case to the jury, the appellate court will not disturb the verdict on the facts. *Wilson* v. *Commonwealth*, 181 Ky. 370, 205 S. W. 391. Of course, the above rules apply only to actions at law in which there is found no prejudicial error of law. They apply alike in civil and criminal actions.

A sound conclusion from the cases appears to be that even though the verdict seems in the opinion of the judge, contrary to the weight of the evidence, if the jury had evidence from which it could reasonably find its verdict, it will not be disturbed unless there has been a prejudicial error of law.

It seems that this is a sound rule in criminal as well as civil actions. According to our system of criminal law, the interests of one accused of a crime are amply protected, and the jury trial in criminal cases is held inviolate. Once the jury has returned its verdict under proper instructions as to the law applicable to the facts, if there is any proper evidence before the jury upon which it could reasonably find such a verdict, it should stand undisturbed. G. B. F.

EVIDENCE—EXPERT TESTIMONY—BLASTING.—The plaintiff had on his farm a large three-story brick residence, which was injured by the blasting operations of the defendant, who herein seeks to reverse a judgment against him in the Mercer County Court. The defendant relies on four grounds, (of which we are interested in only the first,) for the reversal of this judgment. The first is that the court erred in the admission of evidence; the alleged error consisting in allowing the plaintiff to testify that these cuts could have been made without using such large quantities of explosives, when he had not shown himself to be an expert in such matters. In disposing of this contention, the appellate court said: "But it does not take an expert to know these things. Those things are known to the ordinary man," and thus held such admission was no error. *Brooks-Calloway Co.* v. *Carroll*, 235 Ky. 41, 29 S. W. 2nd, 592.

In the first place, a knowledge of the properties of dynamite and other explosives is not, as a matter of fact, a part of the general com-

prehension of the average man. Unless one lives in a mining or similar community, opportunity for a familiarity with explosives almost never occurs. The members of the Court of Appeals themselves are undoubtedly ignorant of such matters unless by the merest accident. This must be especially true of the inhabitants of Mercer County, who are largely farmers and stock-growers. Even one who has lived in a mining community probably does not know how much dynamite is required to move a given amount of rock a certain distance. To acquire such knowledge, it is necessary to either study the subject or actually use the explosive, neither of which the average man does. Questions of this nature are always the subject of expert testimony. A peculiar knowledge is requisite to the answer.

Secondly, the testimony of the plaintiff was nothing but his own mere opinion. He did not detail facts; he described no occurrence; he set forth no knowledge of his own. He merely stated his opinion as to the effect of a given set of circumstances, the typical place for an expert opinion. This an ordinary witness cannot do. "Whatever is presented to the senses of the witness and of which he receives therefore direct knowledge, he may state. This is strictly matter of fact. What he has seen or heard of felt, he knows in the sense in which the law requires knowledge on the part of the witness testifying. What he thinks in respect to the existence or non-existence of a fact in issue, is a matter of opinion and he cannot state it. It is for him to put before the jury the facts as he perceived them by his senses, and for the jury to form an opinion concerning the facts in proof of which the evidence was offered." McKelvey on Evidence, (3rd Ed.) p. 259, wherein are cited some of the innumerable cases sustaining this proposition. A witness must testify as to facts and not to the opinion or conclusion he himself adduced from these facts. That is the exclusive function of the expert witness on matters subject to expert testimony. The ordinary witness must confine himself to personal observations. The witness in this case, whom the court called an ordinary witness, was given a purely imaginary set of facts, and asked the probable result, i. e., what in his opinion the probable result would be. In effect, the witness was asked, "Given a certain amount of rock to be moved, how much dynamite would it take to move it?" The witness did not state what had happened, but gave his prophetic opinion as to what might happen, or what would happen. This the law does not permit him to give in evidence. Such hypothetical questions, formulated for the particular purpose of eliciting an opinion can properly be asked only of an expert or skilled witness, and the answer, necessarily being a mere opinion, ought not be admitted. "Since hypothetical presentation is proper and necessary only when the witness has not had actual observation, does it follow that to anyone at all, who has not had actual observation, the premises may be presented hypothetically, and his conclusion asked upon them? By the opinion rule, the tribunal will not listen to conclusions or opinions of persons who possess no more skill than the tribunal itself in drawing inferences from the premises,

i. e., persons of only ordinary skill. The hypothetical form of presentation is proper, therefore, for those witnesses only who bring to the consideration of the particular premises in hand a more than ordinary skill." Wigmore on Evidence (2nd Ed.) Sec. 679. *Ragland* v. *State*, 125 Ala. 12, 27 So. 983; Dunham's Appeal, 27 Conn. 197; Dolbeen's Estate, 149 Cal. 227, 86 Pac. 695; *Chicago and W. I. R. R. Co.* v. *Heidenreich*, 254 Ill. 231, 98 N. E. 657. The following language from the case of *Lawrence* v. *Kaul Lumber Co.*, 171 Ala. 300, 55 So. 111, is peculiarly appropriate to this case: "If the witness was not an expert" (as in the instant case) "and no expert knowledge was required for his conclusions" (as the court in the present case decided), "manifestly his opinion could be of no service to the jury since they were in possession of all the facts upon which his conclusion rested, and were capable of drawing a correct conclusion for themselves." The Kentucky courts heretofore have followed the general rule. "Witnesses must state facts and not their conclusions." *Coker v. Coker*, 216 Ky., 669. It seems to us for these reasons that the lower court erred in the admission of this evidence, and that the Court of Appeals should have reversed the decision. H. T. W.

EVIDENCE—PAROL TESTIMONY TO VARY AGREEMENT.—A creditor, after signing a creditor's agreement not to sue or molest defendant company, brings an action to cancel his own obligation to the agreement on the ground that his signature was obtained by fraud and misrepresentation to the effect that all other creditors, except two, whose claims amounted to $81.00, had signed the agreement, whereas, claims amounting to over $3,000.00 were outstanding at the time agreement was entered into.

The agreement contained no stipulation that all creditors must sign it before it became effective but did not say that only such number would be asked to sign as should prove satisfactory to the trustees selected by the creditors.

Held that the representation that no other claims were outstanding was material and, being false, warranted a cancellation of the contract. *Goodin et al.* v. *Page*, 235 K. 54, 29 S. W. 2d 581.

Defendant's attempt to secure a reversal of this holding was on the ground that the agreement did not require the signature of all creditors and that the attack on it was not for fraud or mutual mistake, but only on the ground that plaintiff's signature was obtained by false representation, and that parol evidence could not be admitted to vary the terms of a written contract.

The decision indicates very clearly that the evidence admitted to prove the false representation was not for the purpose of varying the terms of the contract but merely to avoid the entire contract—that when the misrepresentation is in the inducement, parol evidence is admissible to attack the whole instrument.

Kentucky is on sure ground in this matter; it is noted in *Provident Savings Insurance Co.* v. *Shearer*, 151 Ky. 298, 153 S. W. 938, that

the court holds parol evidence admissible to show fraud, mistake, and misrepresentation of a written contract but specifically rejects it if the purpose be to vary the terms thereof; again in *Smith & Nixon Co.* v. *Morgan*, 152 Ky. 430, 153 S. W. 749, the court says that a written contract may be attacked as a whole by parol evidence which shows that it was obtained by fraud, or by misrepresentation, or by mutual mistake. In the case of a widow testifying as to agreements made previous to or contemporaneous with her entering into an ante-nuptial contract, it was held in *Gaines* v. *Gains' Adm.*, 163 Ky. 260, 173 S. W. 774, that all such agreements must be considered as merged into the written instrument, and that evidence concerning them as a whole cannot be admitted unless there was fraud or misrepresentation in the execution of the contract.

Williston on "Contracts" at p. 2668, section 1500, states that rescission of a written contract is allowable for any kind of material misrepresentation, even though innocently accomplished, since it would be unjust to allow one party to retain the fruits of a bargain induced by misrepresentation.

The principle is universally accepted that a contract may be rescinded if the statement inducing the procurement of the contract is false and relied upon even though no fraud be present. *Trimble* v. *Reid*, 97 Ky. 713, 31 S. W. 861, 17 Ky. Law Reporter 494.

The Supreme Court of the U. S. in *Hartshorn* v. *Day*, 19 Howard 111, held that parol evidence is admissible to show that imposition has been practiced upon a party in procuring his signature.

Inference that the whole instrument must be attacked is very clear; none of its terms may be varied or cancelled, and new terms cannot be added. H. H. B.

EVIDENCE—PHYSICAL EXAMINATION IN THE PRESENCE OF THE JURY.—Plaintiff sued for damages for injury to his back and spine, incurred while in defendant's employment. During the trial, in the presence of the jury, the court allowed, over the objection of the defendant, a doctor to run his fingers up and down the spinal column of the plaintiff, and during this examination, the plaintiff cried out in pain at certain times, and later objected to standing alone and unassisted in the court room. Verdict for the plaintiff, and defendant appeals, assigning as error, among others, the court's allowing this physical examination in the presence of the jury. Held error; judgment reversed and cause remanded for a new trial. Such an examination can show nothing of value pertaining to the actual injury of the plaintiff, and can only excite the jury and increase the damages given through the pity aroused for the suffering plaintiff. *Meyer* v. *Johnson et al*, 30 S. W. 2nd 641., Mo.

The rule as to exhibitions of injuries to juries seems to be well marked out and firmly founded on good reasons. It allows exhibitions of amputated members and even of the amputated portions themselves to show the actual extent and character of the maiming as the very

best way to show the jury the injuries suffered by the plaintiff. The only limitation is where the exhibition would necessitate such an indecency as would have no place in the judicial procedure. 1. Thompson On Trials Sec. 858. Thompson further says that if it is best for justice between party and party, the court may order an inspection, but in any event it is within the sound discretion of the trial judge to order or allow it. And further, "the objection that such an exhibition has a tendency unduly to excite the sympathies of the jurors is not tenable." All this as to exhibitions, which are perfectly permissible in most courts by the weight of authority; the difficulty is encountered when the trial court permits a crippled plaintiff to hobble across the court room in a pitiable manner to show the jury the use he can make of his crutches and the stump remaining to him. There is no doubt but that such a spectacle will cause the jurors to pity the victim, and it is very likely that this pity will be reflected in the amount of the damages returned in case the jury finds for the plaintiff. In the case of *Willis* v. *City of Browning*, 161 Mo. Appeals 461, 143 S. W. 516, cited in the principal case, the plaintiff was allowed to exhibit her injured ankle to the jury, which was held proper and afterwards her lawyer said to her, "show the jury the best that you can do." A demonstration followed, which was held to be reversible error, the court saying: "The defendant suffers enough unavoidable disadvantages in a trial for personal injuries. Should a sensitive wound be touched in order that the jury might hear the plaintiff scream? The maimed, the widow, and the orphan draw strongly enough on the hearts of the jurymen without any affirmative effort to arouse sympathy. Further, there is no restraint on the opportunity for simulated evidence."

In *Osborne* v. *City of Detroit*, 32 Fed. 36. the plaintiff's physician was permitted to stick a pin into the plaintiff's right cheek, arm, side, thigh, leg, and ankle to show to the jury that the entire right side of her body was paralyzed. This was held to be an examination only, and not a demonstration. This case was later reversed, but not on this point, 135 U. S. 492. This case is cited with approval in *Kansas City Southern* v. *Clinton*, 224 Fed. 896, where the court upheld the trial court's ruling that it was permissible for the plaintiff to give a practical illustration of his condition before the jury.

The Kentucky Court of Appeals in the case of *Madison Coal Corporation* v. *Altmire*, 215 Ky. 283, 284 S. W. 1068, held, however, that it was error and improper for the court to allow plaintiff's attorney to conduct exactly such a physical examination before the jury by pricking plaintiff's body with a needle to show the extent of paralysis suffered by coming in contact with a high tension wire in a coal mine. There was some doubt in this case though whether or not the paralysis was caused by the wire or bodily conditions of the plaintiff before the alleged injury. If the injury had been conclusively proven to be the result of the contact, and the only purpose was to show the extent of the disability suffered, it is possible that the court would have ruled otherwise on this question. The Kentucky Court has previously held

that it is proper to exhibit injured arms and legs to the jury, saying that it is a material fact, (the character and extent of the injury) necessary to determine the amount of damage to award in case the plaintiff is allowed to recover. *Newport News and M. V. Ry. Co.* v. *Carroll* 17 Ky. Law Reporter 374., 31 S. W. 132, and later in the case of *Ford* v. *Providence Coal Co.*, 124 Ky. 517, 99 S. W. 609, the only limitation put upon the rule that it is proper for the plaintiff to exhibit the injured members to the jury is that no impropriety or indecency be present in the examination. This case also says that such an exhibition and examination is the best evidence obtainable of the character and extent of the injury.

It is believed that there is no substantial conflict in the cases on this question, which will arise in a very large per cent of personal injury suits. The debatable ground is encountered when the line, which divides a legitimate and fair examination or exhibition from a sympathy—engendering demonstration of ability to walk or move the injured part, is approached. This distinction is nicely observed in the Illinois case of *Johnson* v. *Wassom Coal Co.*, 173 Ill. App. 414, where the plaintiff was permitted to display his injured ankle to the jury, but was not permitted to move it. J. H. C.

SURETY—CONTRACTOR'S BOND—LIABILITY TO MATERIALMAN.—The principal contracted with the Kentucky State Highway Commission to construct a bridge, the vital clause of the agreement reading, "That the party of the second part (contractor) hereby agrees under penalty expressed in the bond hereunto attached, to furnish and deliver all materials and do and perform all the work and labor required in the construction of (certain bridgework)." The principal executed a bond with defendant surety which read in part, "The condition of this obligation is such that if said principal shall well and truly keep and perform all of the terms and conditions of a certain contract and shall indemnify the said Commonwealth of Kentucky as therein stipulated, etc." Neither the bond nor the contract contained any express provision in favor of materialmen. The plaintiff, who had furnished materials to the principal, rested his case against the surety on the ground that, since the materialmen could not assert a lien on public property, "it will be presumed that the bond was intended for the benefit of laborers and materialmen." The Court of Appeals, unable to find in the written instruments any provision for the benefit of materialmen, rendered a decision in favor of the surety, pointing out the distinction between this case and one where the bond, read in connection with the contract, creates an obligation in favor of the materialmen. *Standard Oil Co.* v. *National Surety Co.*, 234 Ky. 764, 29 S. W. (2d) 29.

This case involves both the rights of a third party who claims to be a beneficiary and the liability of a surety. While the dogma of stricti juris has been so modified that an ambiguous clause in a bond made by a compensated surety will be given the interpretation most

unfavorable to the surety, the principle that a surety is bound only by the express terms of his contract still has vitality. *Champion Ice Mfg. etc.* v. *American Bonding Co.*, 115 Ky. 863, 75 S. W. 197; *American Surety Co.* v. *Pauly*, 170 U. S. 133, 18 Sup. Ct. 552; *Pond Creek Coal Co.* v. *Citizens Trust & Guaranty Co.*, 170 Ky. 601, 186 S. W. 494. However, it seems more reasonable to hold that this rule should not interfere with the use of ordinary tests by which the actual meaning and intention of contracting parties are primarily determined. *American Bonding Co.* v. *Pueblo Investment Co.*, 150 Fed. 17, 80 C. C. A. 97.

Under the Kentucky doctrine that the business of "surety companies" is in all essential particulars that of insurers, it seems that the contract of surety in such a case should be given the same interpretation as other written contracts. *Champion Ice Mfg. etc.* v. *American Bonding Co., supra.*

In the instant case the court said, "We have in Kentucky two distinct lines of decision in cases of this character. If the bond, when read in connection with the contract, contains a provision obligating the contractor to pay for the material . . . it constitutes a provision for the benefit of . . . and materialmen, upon which they are entitled to maintain an action directly against the surety. On the other hand, when the bond is one solely to secure performance of the contract and contains no language from which an express covenant for the benefit of third parties may be derived, an action thereon by a stranger to the contract may not be maintained." This view has support in the Kentucky decisions cited by the court. *Dayton Lumber Co.* v. *New Capitol Hotel*, 222 Ky. 29, 299 S. W. 1063; *Owens* v. *Georgia Life Ins. Co.*, 165 Ky. 507, 177 S. W. 294.

Other courts have also recognized the rule that a surety is not liable to a materialman unless the contract or bond, by express terms, obligates at least the principal to pay for materials and labor. *Dunlap* v. *Eden*, 15 Ind. App. 575, 44 N. E. 560; *Electric Appliance Co.* v. *U. S. Fidelity & Guaranty Co.*, 110 Wis. 434, 85 N. W. 648; *Gato* v. *Warrington*, 37 Fla. 542, 19 So. 883. Several courts deny the materialmen an action against the surety even where there is an express provision in the instruments that the principal will pay for labor and materials. *Jefferson* v. *Asch*, 53 Minn. 446, 55 N. W. 604; *Board of Agriculture* v. *Dimick*, 46 Colo. 609, 105 P. 1114.

The contract and bond in the case of *Mayes* v. *Lane*, 116 Ky. 566, 76 S. W. 399, were almost identical with the instruments in the present case, the contractor agreeing to "furnish and deliver all materials." But the plaintiff in that case was the owner of the building who had been forced to pay liens to materialmen. The surety tried to evade liability for these payments by the obligee of the bond on the ground that there was no express provision in the contract whereby the contractor bound himself to pay for material. The court rightly held that the obligations of the contractor and the surety included payment for materials, thus construing "to furnish and deliver" to mean "to pay for." This case shows that the owner of the building need not stipu-

late in the contract and bond for payment to materialmen by express provisions. It therefore follows that where there is an express provision for materialmen it was intended for their benefit, since the owner is protected otherwise.

The court in the decision under discussion is no doubt correct in saying that, "before a stranger can avail himself of the exceptional privilege of suing for the breach of an agreement to which he is not a party, he must at least show that it was intended for his direct benefit." Some other courts to the contrary, Kentucky has held that a citizen who has suffered loss to his house by fire through a failure of the water company to maintain sufficient pressure may recover from the water company as a beneficiary of the contract whereby the water company obligated itself with the city as promisee to maintain a certain water pressure. *Paducah Lumber Co.* v. *Paducah Water Co.*, 89 Ky. 340, 12 S. W. 554. In so holding the court interpreted the contract between the city and the company as intended by the city to be for the benefit of its inhabitants. Thus Kentucky seems to be more liberal toward a third party beneficiary than some other courts.

The primary consideration is the intent of the promisee in obtaining the contract. In most cases where the contract specificially obligates the builder of public buildings to pay for labor and material it is apparent that the promisee intended the promise for the benefit of laborers and materialmen, since liens do not serve their ordinary function of protecting materialmen. It is only reasonable to assume, therefore, that where a party to a contract who is exempt from mechanics' liens desires to protect a third party materialman, he will do so in such an affirmative manner that it will specificially appear in the written instruments through which he accomplishes this purpose.

In the present case the court necessarily infers that the clause "to furnish and deliver all materials" is not tantamount to one which reads "to pay all claims of materialmen and laborers against the contractor." C. S.

TORTS—NEGLENCE—INVITATION—LICENSE.—Defendant, R. R. Co., for forty years had allowed the public to use its bridge as a footway. In constructing a new bridge running parallel to the old bridge, it had taken up the flooring from the old bridge but subsequently had relaid the flooring, so that the footway could be used, and pedestrians used it thereafter just as they had used it before interruption caused by temporary removal of flooring. In reconstructing the flooring a guard rail was left exposed, and at or near such point on the bridge the deceased, on his way home in the nighttime with his small son, was struck by a passing freight train and was instantly killed. No notice prior to this time had been given by the defendant R. R. Co. to the public that permission to use the bridge had been withdrawn. Held: That, although the deceased was not an invitee in the technical sense that one going upon the premises of another for their mutual benefit and advantage is an invitee, the facts of the case bring it within the class

of cases in which the doctrine has been recognized and applied that, when the owner by his conduct has induced a party to use a private way in the belief that it is open for the use of the public, the duty is imposed upon him of maintaining the way in a reasonably safe condition. *L. & N. R. R. Co.* v. *Snow's Admr.*, 235 Ky. 211, 30 S. W. (2d) 885.

A licensee is one who is upon the premises of another for his own benefit or pleasure, and he must take the premises as he finds them. The licensor is liable only for gross negligence. *I. C. R. R. Co.* v. *Eicher*, 202 Ill. 556, 67 N. E. 376; *Cumberland, etc., Co.* v. *Martin*, 116 Ky. 557, 76 S. W. 394.

An invitee is one who is expressly or impliedly invited upon the premises of another for the mutual benefit or advantage of both parties, and the owner of the premises is under a duty to have them in a reasonably safe condition. *D'Amico* v. *City of Boston*, 176 Mass. 599, 58 N. E. 158; *Land* v. *Fitzgerald*, 68 N. J. L. 28, 52 Atl. 229.

It is quite clear that, in the instant case, the deceased was not upon defendant's bridge for the mutual advantage of both parties and so, as stated in the court's opinion, could not be classed as an invitee. However, regardless of this technical classification and the relationship existing between the parties, many courts have recognized an exception in case of a way across lands or structures thereon. If the owner or occupant has permitted persons generally to use or establish a way under such circumstances as to induce a belief that it is public in character, he owes to persons availing themselves thereof the duty due to those who come upon premises by invitation. *Pomponio* v. *N. Y., etc., R. Co.*, 66 Conn. 528, 34 Atl. 491, 50 A. S. R. 124, 32 L. R. A. 530; *Chenery* v. *Fitchburg R. Co.*, 160 Mass. 211, 35 N. E. 554, 22 L. R. A. 575. As stated in Shearman and Redfield on Negligence, sec. 706: "Invitations will also be implied from such long acquiescence as reasonably to give rise to the inference that it is invited, but it is not ordinarily to be inferred from mere passive acquiescence in what would otherwise be a trespass."

By the weight of authority, where ways have been used by the public for such length of time that they have come to be regarded as public ways, the owners of such must take care not to make them unsafe until proper notice of the change has been given. But this pirnciple must be distinguished from mere permission to pass over lands. *Vanderholt* v. *Hendry*, 34 N. J. L. 471.

The instant case clearly comes within the recognized exception. The bridge in question had been used by the public for years with the acquiescence and consent of the defendant R. R. Co., and it had been left, due to its changed condition, in an unsafe condition for parties passing over it in the nighttime. The defendant Co. was negligent in its duty to the deceased, in not giving notice of the changed condition of the bridge. J. K. L.

TORTS—LIABILITY OF FATHER FOR MINOR SON'S NEGLIGENCE.—Defendant owned an automobile for the general use of the family and which had been used by his minor son, a boy under sixteen years of age, for more than a year as transportation to and from school, defendant acquiescing in the use. While returning from school in this car the son negligently ran into and injured the plaintiff. In an action to recover therefor, it was held, that a father who knowingly permits his minor son to drive his automobile in violation of Laws 1921 (Ex. Sess.) p. 104, section 27 (i) making it "unlawful for any person under sixteen years to operate a motor vehicle on the highways," is liable for son's negligence. *Roark* v. *Stone*, — Mo. App. —, 30 S. W. (2d) 647.

As a general rule a father is not liable for the torts of his minor son. *Loehr* v. *Abell*, 174 Mich. 590, 140 N. W. 926. However under two principal lines of cases a father may be liable for such torts, namely, under the "Strict Agency Doctrine" and under the "Family Purpose Doctrine." Both rules are based upon an agency relationship, for paternity alone will not render a parent liable at common law for the torts of his son, nor will the mere ownership of the car make him so. *Denison* v. *Norton*, 228 Fed. 401, 142 C. C. A. 631. The strict agency doctrine holds a father liable as principal for the acts of his minor son done in the furtherance of his father's business. If the son commits a tort while acting within the general scope of authority from the father, or in carrying out some enterprise for which he was commissioned, the father may be liable even though he had no knowledge of the specific conduct in question. Where a father provides a car to give his family recreation, the use of such car is within the scope of the father's business. *Stowe* v. *Morris*, 147 Ky. 386, 144 S. W. 52. But if the act of the son is not done in the furtherance of his father's business but in the performance of some design of his own, the father is not liable. *Smith* v. *Jordan*, 211 Mass. 269, 97 N. E. 760. Nor is a father liable, under the strict agency rule, because he gave his minor son permission to use the car. In order to recover, the plaintiff must show that the son acted as his father's agent and was at the time of the accident engaged in his father's business. *Dennis* v. *Glynn*, 262 Mass. 233, 159 N. E. 516.

The family purpose doctrine, which is adhered to in Kentucky, is stated thus, "The family purpose doctrine is founded on the relationship of principal and agent; the theory being that if one maintains an automobile or other vehicle for the use, pleasure, and convenience of the members of his family, and it is being used by them for that purpose when an accident occurs, the one so using the machine will be deemed the agent of the owner and to have been operating the car under the owner's authority, which may be express or implied." *Steele* v. *Age's Adm'x*, 233 Ky. 714, 26 S. W. (2d) 563. Missouri once followed the family purpose doctrine. *Daily* v. *Maxwell*, 152 Mo. App. 415, 133 S. W. 351. In that case the father gave his son permission to use the family automobile and an accident occurred

through the latter's negligence. Held, father is liable when he furnished his son an auto for his own pleasure, or to run errands, such as doing personal shopping or going to school. The court said that it was as much the father's business to furnish his son amusement as it was to support and educate him. This doctrine is inapplicable in a case where a thirteen year old minor surreptitiously takes the family car without the father's consent and against his express orders, because liability of the father is predicated upon agency and this relation did not exist here. *Sale* v. *Adkins*, 206 Ky. 224, 267 S. W. 223.

It is doubtful whether the family purpose doctrine obtains in Missouri since the case of *Hays* v. *Hogan*, 273 Mo. 1, 200 S. W. 286, cited with approval in the instant case. There, after an exhaustive review of the authorities, the court held, "The mere ownership of an automobile purchased by a father for the use and pleasure of himself and family does not render himself liable in damages to a third person for injuries sustained thereby, through the negligence of his minor son while operating the same on a public highway in furtherance of his own business or pleasure; and the fact that he had his father's special or general permission to use the car is wholly immaterial." In view of the Hogan decision, *supra*, defendant can be liable in the principal case only under an interpretation of the statute, for the facts negatived the existence of a strict agency relationship between defendant and the minor son. The statute made it unlawful for a minor under sixteen to drive on the highways, but the court holds it is negligence on the defendant's part to permit a person deemed incompetent under the law to drive, saying, "If the statute. . . . is to have any effect whatever, the father who knowingly permits such violation of the law, and whose negligence in so doing makes it possible for the child to cause an injury, must be held liable on account of such negligent act." L. B. R.

TORTS — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — LAST CLEAR CHANCE—HUMANITARIAN RULE.—The plaintiff with his face turned to the south stepped from the curb on to the tracks of the defendant's street car line, and there was struck and injured by a car of defendant coming from the north. The Court based its decision on the humanitarian rule, and said, "The burden of proof was upon the plaintiff to show facts that would render defendant liable on that theory. To do this he must have shown that the motorman on this street car did, or should have discovered the plaintiff was going into a position where he would be struck unless the car were stopped, or plaintiff warned in a manner, and in time to have stopped him before he was struck." *McGuire* v. *Springfield Traction Co.*, 30 S. W. (2nd), (Mo.), 794.

In the early law, contributory negligence was an absolute defense. The case of *Davies* v. *Mann*, 10 M. & W. 546, was the first to limit this doctrine by applying the last clear chance rule.

"If the power to avert the danger existed in both parties until a

certain instant, and in neither afterward, contributory negligence would be, with one exception, a good defense." 24 Yale Law Journal 330.

Thus the Court in the principal case implies that defendant would not be liable if, after due warning, the plaintiff continued to walk on to the tracks. Ignorance of the danger amounts to an inability to avert it. The last clear chance, if any, to avoid the injury is in defendant.

In such a situation, where defendant alone has the last clear chance, all courts would agree that the defendant would be liable if he had knowledge of the plaintiff's danger and failed to use ordinary care to avert it. Here, however, the courts part company. By the weight of authority actual knowledge of the plaintiff's danger is required to subject the defendant to liability. *Waterman* v. *Visalia Electric Railway Company*, 137 Pac. (Cal.) 1096; *Iowa Central Railway Co.* v. *Walker*, 203 Fed. 685; *St. Louis S. W. Railway Company* v. *Cochran*, 77 Ark. 398; *Wolf* v. *Chicago Great Western Ry. Co.*, 147 N. W. (Iowa) 1901; *Zitnik* v. *Union Pacific Railway Company*, 136 N. W. (Neb.) 995. Many courts adopt the humanitarian rule and impose liability if the defendant had such an opportunity as would have enabled an ordinarily reasonable man to discover the plaintiff's danger in time to avert the danger. *Brown* v. *Kansas Elec. Utility Co.*, 203 Pac. (Kan.) 907; *Hornbuckle* v. *McCarty*, 243 S. W. (Mo.) 327; *Nicol* v. *The Oregon-Washington R. & N. Co.*, 128 Pac. (Wash.) 628; *Ray* v. *Aberdeen R. R. Co.*, (N. C.) 53 S. E., 622; *Kinney* v. *St. Louis & S. R. R. Co.*, 133 Pac. (Okla.) 180. Kentucky apparently accepts the humanitarian rule although there is some confusion in the cases. *Ross* v. *Louisville Taxicab & Transfer Co.*, 202 Ky. 828; *L. & N. Rwy. Co.* v. *Lowell*, 118 Ky. 260; *Doll* v. *Louisville Rwy. Co.*, 138 Ky. 486; *I. C. R. R. Co.* v. *Pierce*, 175 Ky. 488.

The courts which enforce the humanitarian rule must necessarily hold that the defendant has a legal duty to keep a reasonable lookout for persons who may, by their own negligence, have placed themselves in dangerous situations. The occurence of such a situation may reasonably be anticipated; it happens every day. Therefore, it is difficult to see why a defendant should not be held to the same duty of exercising reasonable care to prevent harm in this type of situation, as he would be where the plaintiff has not by his own negligence created the condition which led to the injury. The operator of a dangerous machine has, in a certain sense, a privilege which should carry with it a greater amount of regard for the safety of others where the operation of the machine subjects others, in their ordinary conduct, to greater dangers.

W. H. D.